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HYDE & SWIGART
 San Diego, California

**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

Michele Bennett, Individually and
 on Behalf of All Others Similarly
 Situated,

Plaintiffs,

v.

Discover Card, a/k/a DFS Services,
 LLC,

Defendant.

Case Number:

10CV 2366
CLASS ACTION

JLS BLM

**Complaint for Damages and
 Injunctive Relief Pursuant To The
 Telephone Consumer Protection
 Act, 47 U.S.C § 227 et seq.**

Jury Trial Demanded

CR

ORIGINAL

INTRODUCTION

- 1
- 2 1. Michele Bennett ("Plaintiff") brings this class action for damages, injunctive
- 3 relief, and any other available legal or equitable remedies, resulting from the
- 4 illegal actions of Discover Card, a/k/a DFS Services, LLC ("Defendant"), in
- 5 negligently, and/or willfully contacting Plaintiff on Plaintiff's cellular telephone,
- 6 in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.,
- 7 ("TCPA"), thereby invading Plaintiff's privacy. Plaintiff alleges as follows upon
- 8 personal knowledge as to herself and her own acts and experiences, and, as to all
- 9 other matters, upon information and belief, including investigation conducted by
- 10 her attorneys.

JURISDICTION AND VENUE

- 11
- 12 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff seeks up to
- 13 \$1,500 in damages for each call in violation of the TCPA, which, when
- 14 aggregated among a proposed class number in the tens of thousands, exceeds the
- 15 \$5,000,000 threshold for federal court jurisdiction. Further, Plaintiff alleges a
- 16 national class, which will result in at least one class member belonging to a
- 17 different state than that of Defendant. Therefore, both elements of diversity
- 18 jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") are present,
- 19 and this Court has jurisdiction.
- 20 3. Venue is proper in the United States District Court for the Southern District of
- 21 California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because the events
- 22 giving rise to Plaintiff's causes of action against Defendant occurred within the
- 23 State of California and the County of San Diego.

PARTIES

- 24
- 25 4. Plaintiff is, and at all times mentioned herein was, an individual citizen and
- 26 resident of the State of California. Plaintiff is, and at all times mentioned herein
- 27 was, a "person" as defined by 47 U.S.C. § 153 (10).
- 28

1 5. Plaintiff is informed and believed, and thereon alleges, that Defendant is, and at
2 all times mentioned herein was, a corporation whose primary corporate address
3 is in New Castle, Delaware. Defendant is, and at all times mentioned herein
4 was, a corporation and a "person," as defined by 47 U.S.C. § 153 (10). Plaintiff
5 is informed and believes, and thereon alleges, that at all times relevant
6 Defendant conducted business in the State of California and in the County of San
7 Diego.

8 FACTUAL ALLEGATIONS

9 6. At all times relevant, Plaintiff was an individual residing within the State of
10 California. Plaintiff is, and at all times mentioned herein was, a "person" as
11 defined by 47 U.S.C. § 153 (10).

12 7. Defendant is, and at all times mentioned herein was, a corporation and a
13 "person," as defined by 47 U.S.C. § 153 (10).

14 8. At all times relevant Defendant conducted business in the State of California
15 and in the County of San Diego.

16 9. Plaintiff opened a credit card with Defendant approximately five years or
17 more from the of the filing of this Complaint. At the time Plaintiff applied for
18 and opened her credit card with Defendant she did not possess her current
19 cellular telephone number.

20 10. Approximately in May 2010 Plaintiff fell behind on her credit card payments
21 to Defendant.

22 11. Almost immediately, Defendant began calling Plaintiff on a daily basis in an
23 attempt to get a hold of Plaintiff and collect on the alleged outstanding
24 balance owing.

25 12. Plaintiff received some telephone calls from Defendant on her home land-line
26 and Plaintiff also received some calls from Defendant on her new cellular
27 telephone, which was not previously provided to Defendant.
28

1 13. Plaintiff received approximately 2-3 automated/prerecorded messages per
2 week, in June through July 2010 for approximately four weeks, on her
3 cellular telephone via an "automatic telephone dialing system," as defined by
4 47 U.S.C. § 227 (a)(1)

5 14. During these telephone calls Defendant used "an artificial or prerecorded
6 voice" as prohibited by 47 U.S.C. § 227 (b)(1)(A).

7 15. The telephone number Defendant called was assigned to a cellular telephone
8 service for which Plaintiff incurs a charge for incoming calls pursuant to 47
9 U.S.C. § 227 (b)(1).

10 16. These telephone calls constituted calls that were not for emergency purposes
11 as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

12 17. Plaintiff did not provide prior express consent to receive calls on Plaintiff's
13 cellular telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).

14 18. These telephone calls by Defendant violated 47 U.S.C. § 227(b)(1).

15 **CLASS ACTION ALLEGATIONS**

16 19. Plaintiff brings this action on behalf of himself and on behalf of and all others
17 similarly situated ("the Class").

18 20. Plaintiff represents, and is a member of, the Class, consisting of all persons
19 within the United States who received any telephone call from Defendant or
20 its agent to said person's cellular telephone made through the use of any
21 automatic telephone dialing system or with an artificial or prerecorded voice,
22 which call was not made for emergency purposes or with the recipient's prior
23 express consent, within the four years prior to the filing of this Complaint.

24 21. Defendant and its employees or agents are excluded from the Class. Plaintiff
25 does not know the number of members in the Class, but believes the Class
26 members number in the tens of thousands, if not more. Thus, this matter
27 should be certified as a Class action to assist in the expeditious litigation of
28 this matter.

- 1 22. Plaintiff and members of the Class were harmed by the acts of Defendant in at
2 least the following ways: Defendant illegally contacted Plaintiff and the Class
3 members via their cellular telephones thereby causing Plaintiff and the Class
4 members to incur certain cellular telephone charges or reduce cellular
5 telephone time for which Plaintiff and the Class members previously paid, by
6 having to retrieve or administer messages left by Defendant during those
7 illegal calls, and invading the privacy of said Plaintiff and the Class members.
8 Plaintiff and the Class members were damaged thereby.
- 9 23. This suit seeks only damages and injunctive relief for recovery of economic
10 injury on behalf of the Class and it expressly is not intended to request any
11 recovery for personal injury and claims related thereto. Plaintiff reserves the
12 right to expand the Class definition to seek recovery on behalf of additional
13 persons as warranted as facts are learned in further investigation and
14 discovery.
- 15 24. The joinder of the Class members is impractical and the disposition of their
16 claims in the Class action will provide substantial benefits both to the parties
17 and to the court. The Class can be identified through Defendant's records or
18 Defendant's agents' records.
- 19 25. There is a well-defined community of interest in the questions of law and fact
20 involved affecting the parties to be represented. The questions of law and fact
21 to the Class predominate over questions which may affect individual Class
22 members, including the following:
- 23 a. Whether, within the four years prior to the filing of this Complaint,
24 Defendant made any call (other than a call made for emergency
25 purposes or made with the prior express consent of the called party)
26 to a Class member using any automatic telephone dialing system or
27 an artificial or prerecorded voice to any telephone number assigned
28 to a cellular telephone service.

- 1 b. Whether Plaintiff and the Class members were damaged thereby, and
2 the extent of damages for such violation; and
3 c. Whether Defendant should be enjoined from engaging in such
4 conduct in the future.

- 5 26. As a person that received numerous calls using an automatic telephone dialing
6 system or an artificial or prerecorded voice, without Plaintiff's prior express
7 consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff
8 will fairly and adequately represent and protect the interests of the Class in
9 that Plaintiff has no interests antagonistic to any member of the Class.
- 10 27. Plaintiff and the members of the Class have all suffered irreparable harm as a
11 result of the Defendant's unlawful and wrongful conduct. Absent a class
12 action, the Class will continue to face the potential for irreparable harm. In
13 addition, these violations of law will be allowed to proceed without remedy
14 and Defendant will likely continue such illegal conduct. Because of the size
15 of the individual Class member's claims, few, if any, Class members could
16 afford to seek legal redress for the wrongs complained of herein.
- 17 28. Plaintiff has retained counsel experienced in handling class action claims and
18 claims involving violations of the Telephone Consumer Protection Act.
- 19 29. A class action is a superior method for the fair and efficient adjudication of
20 this controversy. Class-wide damages are essential to induce Defendant to
21 comply with federal and California law. The interest of Class members in
22 individually controlling the prosecution of separate claims against Defendant
23 is small because the maximum statutory damages in an individual action for
24 violation of privacy are minimal. Management of these claims is likely to
25 present significantly fewer difficulties than those presented in many class
26 claims.
- 27
28

- 1 30. Defendant has acted on grounds generally applicable to the Class, thereby
 2 making appropriate final injunctive relief and corresponding declaratory relief
 3 with respect to the Class as a whole.
 4

5 **FIRST CAUSE OF ACTION**
 6 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
 7 **47 U.S.C. § 227 *ET SEQ.***

- 8 31. Plaintiff incorporates by reference all of the above paragraphs of this Complaint
 9 as though fully stated herein.
 10 32. The foregoing acts and omissions of Defendant constitute numerous and
 11 multiple negligent violations of the TCPA, including but not limited to each and
 12 every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*
 13 33. As a result of Defendant's negligent violations of 47 U.S.C. § 227 *et seq.*,
 14 Plaintiff and The Classes are entitled to an award of \$500.00 in statutory
 15 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
 16 34. Plaintiff and the The Classes are also entitled to and seek injunctive relief
 17 prohibiting such conduct in the future.

18 **SECOND CAUSE OF ACTION**
 19 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
 20 **TELEPHONE CONSUMER PROTECTION ACT**
 21 **47 U.S.C. § 227 *ET SEQ.***

- 22 35. Plaintiff incorporates by reference all of the above paragraphs of this Complaint
 23 as though fully stated herein.
 24 36. The foregoing acts and omissions of Defendant constitute numerous and
 25 multiple knowing and/or willful violations of the TCPA, including but not
 26 limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et*
 27 *seq.*
 28 37. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227
et seq., Plaintiff and each of the The Classes are entitled to treble damages, as

provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

38. Plaintiff and the The Classes are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and The Class members the following relief against Defendant:

FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.*

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class and Subclass member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.*

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class and Subclass member treble damages, as provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

//

TRIAL BY JURY

Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiffs are entitled to, and demand, a trial by jury.

Date: October 21, 2010

HYDE & SWIGART

By: _____

Joshua B. Swigart

Attorneys for Plaintiff

HYDE & SWIGART
San Diego, California

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Michele Bennett, Individually and on Behalf of All Others
Similarly Situated

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hyde & Swigart
411 Camino Del Rio South Suite 301, San Diego, CA 92108

DEFENDANTS

Discover Card, a/k/a DFS Services, LLC

County of Residence of First Listed Defendant San Diego
(IN U.S. PLAINTIFF CASES ONLY) DEPUTY

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

10CV 2366

JLS BLM

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
47 U.S.C. § 227 et seq. 28:1331 gfc

Brief description of cause:
 TCPA

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

11/15/10

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

20315

AMOUNT

350.00

APPLYING IFP

JUDGE

MAG. JUDGE

MS 11/17/10

ORIGINAL

CR

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS020315
Cashier ID: msweeney
Transaction Date: 11/17/2010
Payer Name: HYDE ANS SWIGART

CIVIL FILING FEE
For: BENNETT V DISCOVER CARD
Case/Party: D-CAS-3-10-CV-002366-001
Amount: \$350.00

CHECK
Check/Money Order Num: 4235
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

There will be a fee of \$45.00
charged for any returned check.